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No. 55.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

CESARO SGRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Summary of Argument

The Brief of Respondent makes two contentions. First, that "The Search Warrant was Executed within the time prescribed by law."

Concededly the Search Warrant was not executed within ten days after its date, as required by statute. The Respondent's contention is merely that it was served within ten days after the date had been changed; and

that "changing the date and reissuing the warrant was, for all intents and purposes, the issuing of a new warrant." But no one had authority to change the date or reissue the warrant. There was neither new information, affidavit, nor complaint made, nor any new finding of probable cause. Therefore, a new warrant could not lawfully have been issued.

The Respondent's second contention is "The Search Warrant issued upon probable cause."

The Search Warrant was issued upon an affidavit by a prohibition agent which alleged a purchase of "a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent of alcohol by volume." (R. 4). The petitioner challenges this as being merely a statement of opinion or conclusion of an unqualified witness, and not a statement of facts as required by law to constitute probable cause for issuing a search warrant. The Respondent's brief seeks to meet this challenge by claiming that since Sec. I of Title II of the National Prohibition Act "specifically names 'beer' in defining intoxicating liquor, it was unnecessary for the affiant to further allege that he had tested the beer and had found it to contain a forbidden quantity of alcohol." (Resp. Brief, Page 4). Because the statute defines the term "beer," as therein used, as intoxicating liquor, does not show an affiant qualified to determine that a beverage purchased by him is such "beer" or "intoxicating liquor." Courts take judicial notice that such beverages as whiskey, gin or wine are intoxicating liquor, not because the statute defines them as intoxicating liquor, but because they are so strongly alcoholic as to be unmistakable. But beer and other beverages may or may not have an unlawful alcoholic content. Therefore, courts require legal proof of their unlawful alcoholic content, before finding them to be intoxicating liquor.

The Brief of Respondent does not contend that the agent's affidavit stated facts to constitute probable cause, nor that it showed him to be qualified to give opinion evidence. It contends rather that such statement of facts, or showing of proper qualification to give opinion evidence, is not required for finding of probable cause; and, also, that at the trial the affiant did show expert qualification to give opinion evidence. Even if the agent had shown such expert qualification at the trial, that would not avail toward the support of the search warrant. Sec. 615 U. S. Code, Page 508, provides:

> "Affidavits and depositions.—The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. (June 15, 1917, c. 30, Title XI, Sec. 5, 40 Stat. 228.)"

Argument

The Respondent's brief at page 8 says:

> "Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute (Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the Commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period."

The Petitioner's main contention on this point is that no one could revive, or lawfully reissue, this void warrant merely by changing its date. That if a second or new search warrant might lawfully be issued at all, it could only be issued upon a new complaint showing "probable cause supported by oath or affirmation" as required by the Fourth Amendment to the Constitution of the United States. Also, the statutory requirements for issuing a search warrant must be met, viz: "The affidavits or

depositions must set forth the facts" and, "If the judge or commissioner is thereupon satisfied * * * he must issue a search warrant * * * commanding him forthwith to search." (Sections 615 & 616, U. S. Code, p. 508.)

The Respondent's brief freely admits that the search warrant had become void because it was not served within ten days after its original date. It neither does nor reasonably could controvert any of the authorities or facts cited in Petitioner's main brief under "Point II." It simply states "We know of no valid reason why the commissioner could not use it (*i. e.,* the void search warrant), as he could a printed blank or form in making out a new warrant" (Resp. Brief, p. 8). But a commissioner could not issue a new warrant without any new affidavit or deposition upon which he might lawfully make a new finding of probable cause. A search warrant is the most drastic weapon known to the law. By it, the privacy of a man's home or his place of business may be invaded by officers of the law and ransacked for evidence to be used against him in criminal prosecution. A strict compliance with the requirements of the Constitution and of the statutes respecting search warrants, is therefore needed to safeguard the rights of citizenship.

The second contention of Respondent's brief, to wit: that the search warrant was issued upon probable cause, seems to be based mostly on the decision in *Johnson v. United States,* 46 F. (2d) 7, which holds:

> "The affidavit and complaint must be read as an entirety and the statements contained therein must be given that reasonable construction which it is obvious was intended by the parties. Construing the allegation of the purchase of 'beer' upon the premises, in connection with the allegations of a thereby resulting violation of the National Prohibition Act, and the averment of the possession upon the premises of intoxicating liquor fit for

> beverage purposes containing more than 1/2 of 1 per cent, etc., we must conclude that the affiant intended to convey the impression of a purchase of 'beer' of a quality which fell within the statutory definition of intoxicating liquor, and that the allegations of the affidavit were sufficient justification for the commissioner's finding of probable cause."

The statements contained in the affidavit apparently were not challenged as being mere conclusions or opinions which the affiant was not shown qualified to give. Perhaps the court's attention was not called to the requirement of the statute that "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." (Sec. 615, U. S. Code, 508.) Nor to such applicable decisions as were cited in Petitioner's brief at page 19, which hold that:

> "The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial. *Giles v. United States* (C. C. A.), 284 F. 208, 214. The Commissioner must be furnished with facts—not suspicions, beliefs, or surmises. *Veeder v. U. S.*, 252 F. 414, 164 C. C. A. 338. A mere conclusion is insufficient either in the affidavit or the complaint. *U. S. v. Kaplan* (D. C.), 286 F. 963, 969."

The only other case cited by the Respondent to support the contention of probable cause, is referred to in the opposing brief at page 12, as follows:

> "In *United States v. McGuire,* 300 Fed. 98 (N. D. N. Y.), an affidavit which appears to have merely stated that the affiant purchased 'beer' was held to show probable cause."

This is a decision by the Hon. Frank Cooper, the trial judge in the instant case. The opinion shows that the affidavit not only alleged that the prohibition agent bought beer, but also that the prohibition agent was told

by the bar tender that a beverage which had just been sold to another party in the presence of the agent was "wine." The affidavit did not allege an opinion by the affiant that a beverage sold was wine. It alleged the fact that the bar tender said it was "wine." Courts have frequently taken judicial notice that "wine" is intoxicating liquor.

The next case cited by the opposing brief is *Berry v. U. S.*, 275 Fed. 680 (C. C. A. 7th). As indicated in that brief, this case does not support the Respondent's contention. Instead thereof, it holds:

> "To constitute a violation, the drink would have had to be 'beer' as defined in the act. These government agents were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it. Their testimony that the liquid was the 'beer' denounced by the act was therefore merely the opinion of unqualified witnesses, and affords no basis for the judgment."

A typical illustration of the unreliability of non-expert opinion is to be found at page 13 of the opposing brief. An ebulliometer is an instrument for measuring the boiling points of liquids (R. 14). It is a rather delicate and expensive instrument, and is not in general use as the opposing brief writer seemed to think. The instrument commonly used to measure the alcoholic content of automobile radiator water is called an hydrometer. It is simply a floating gauge for measuring the specific gravity of liquids. If the opposing brief writer had been an expert in the use of an ebulliometer, he would not have confused it with the hydrometer, or instrument commonly used by automobile owners.

Whether Agent Dodd showed at the trial expert qualification to determine the alcoholic content of beer by use of the ebulliometer; or whether he established at

the trial expert qualification to determine the alcoholic content of beer by tasting it, is entirely immaterial. If the agent had such qualifications, the same should have been shown in his affidavit upon which the search warrant was issued. The failure to show any such expert qualification in the affidavit for search warrant, left his allegations of opinion and conclusion therein contained, incompetent as evidence and worthless as grounds for issuing a search warrant. Evidently the agent's testimony at the trial failed to satisfy the jury that he was an expert or qualified to determine the alcoholic content of beer either by the use of an ebulliometer or by tasting it; as otherwise, the jury would have found the defendant guilty on the charge of sale.

The other six cases cited in Respondent's brief are not in point on the two questions submitted for review. They simply hold that periods of from 12 to 21 days between the time of an offense and the issuance of a search warrant are not unreasonable.

As more fully appears in the brief filed with the petition for certiorari, the search warrant in the instant case was issued without probable cause solely upon the affidavit of a prohibition agent who alleged therein merely his opinion that a beverage he bought was beer having an unlawful alcoholic content. Also, the search warrant was not executed within ten days of its date, and was therefore void by statute. The evidence obtained by service of this void and illegal warrant was the sole basis of the judgment of conviction herein. All of which was in direct violation of the Constitution of the United States. The judgment should therefore be reversed.

Respectfully submitted,

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OCTOBER, 1932.